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No. 80-1670

IN THE

Supreme Court of the United States

October Term, 1980

DEPARTMENT OF AGRICULTURE OF THE STATE OF GEORGIA, et. al.,
Petitioner,

v.

J. L. SMITH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the decision of the Court of Appeals for the Fifth Circuit in conflict with the decisions of the United States Supreme Court in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, ___U.S.___, 100 S. Ct. 271 (1980)?

2. Does the rule of the Department of Agriculture of the State of Georgia, giving priority assignments of Farmers' Market space to Georgia residents and declaring that less desirable spaces shall be assigned to nonresidents of the State of Georgia, impose an impermissible burden on Interstate Commerce in violation of Section 8 of the Constitution of the United States?

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STATEMENT OF THE CASE

Since Respondent is unable to agree entirely with the statement of the case set forth in the Petition for Writ of Certiorari, Respondent respectfully submits his own statement of the case. For ease of identification Respondent shall adopt the same references to parties as used by the Petitioners, as follows: Respondent J. L. Smith will be referred to as "Smith"; the State Farmers' Market in Columbus, Georgia, will be referred to as "Columbus Farmers' Market"; and the Petitioner Department of Agriculture of the State of Georgia will be referred to as "Department."

Respondent Smith is a farmer who lives and farms in Alabama. His sole source of livelihood is the growing and selling of farm produce, primarily consisting of vegetables indigenous to this area of the South, such as butter beans, peas, okra, corn, and tomatoes.

For twenty years Smith has sold his vegetables at the Columbus Farmers' Market, which is a market area owned and operated by the State of Georgia at which produce is offered for sale to the public. Individuals seeking to sell their produce at the Columbus Farmers' Market obtain a license from the Department allowing them to do so.

The portion of the Columbus Farmers' Market available for use by individuals for the sale of produce consists of three shed areas. Two of the areas are described as "elevated sheds" with the third area being described as a "drive-through shed", or locally known as the "watermelon shed." While the Petitioners describe the differences between the elevated shed and the drive-through shed as slight, the differences are numerous and are much more onerous than slight. The differences include the absence of an elevated platform for the display of produce in the drive-through shed, requiring the Alabama farmer who has been assigned to that space to display his produce either on the back of his truck or on the asphalt pavement. The drive-through shed lacks water either for drinking or keeping vegetables damp and cool, while the elevated shed has such water facilities. The drive-through shed has less accessible parking space for customers, less shaded area within which the vegetables remaining on the farmer's truck can be protected from sun and rain, and is generally, in every respect, a less desirable sales location. The local manager of the Columbus Farmers' Market himself testified that the elevated sheds were more desirable sales spaces, and Petitioners admit that the purpose and rationale of the rule or regulation of the Department is to afford a preference to Georgia residents.

Smith has sold his produce at the Columbus Farmers' Market for more than twenty years. Until 1978, he had been assigned space at the Columbus

Farmers' Market on a "first come - first served" basis. Beginning in he was informed by the Petitioners that space would be assigned on a basis giving preference to Georgia residents, so that nonresidents of the State of Georgia would be relegated to the drive-through shed if there was not enough space under the elevated shed to accommodate Georgia farmers. That is, if the number of Georgia farmers desiring to sell produce was equal to or greater than the number of spaces available under the elevated sheds, then all of the elevated shed space would be assigned to Georgia farmers, and nonresident farmers (meaning Alabama farmers) would be assigned to space in the drive-through shed.

During the summer of 1978, Smith was ordered by the Department and the local manager to move from the elevated shed where he had previously been assigned, and to locate his truck and produce in the drive-through shed. The admitted and avowed purpose of requiring Smith to move was that he was an Alabama resident, and the elevated shed space was to be reserved, when needed, for Georgia residents. Smith refused to move, was threatened with suspension or revocation of his license, and, in fact, was given notice of a hearing at which the Department would seek to revoke his license.

Smith filed suit in the United States District Court for the Middle District of Georgia, Columbus Division, asserting as grounds for his suit that the rule of the Department violated the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause of the Fourteenth Amendment of the Constitution of the United States.

Following an evidentiary hearing at which testimony was received from Petitioner Williams (Manager of the Columbus Farmers' Market), from

Emory Brinson, Assistant Commissioner for Marketing, Georgia Department of Agriculture, and from Respondent Smith, the District Judge reached certain findings of fact and conclusions of law, attached to the Petition for Writ of Certiorari as Appendix B, and made a part hereof by reference. The findings of fact of the trial court, unchallenged by Petitioners, demonstrate the advantages of the elevated shed over the drive-through shed, and further demonstrate the discriminatory rationale and basis for the regulation; to-wit, the rule intends to discriminate against nonresidents of the State of Georgia because they are nonresidents.

The District Court issued a permanent injunction, enjoining and preventing the State of Georgia and the Department from enforcing its discriminatory regulation. The Department appealed to the United States Court of Appeals for the Fifth Circuit, wherein the decision was affirmed. The Department's Petition for Rehearing and Suggestion for Rehearing En Banc was filed and denied, and Petitioners now seek a Writ of Certiorari to review the decision of the Fifth Circuit.

SUMMARY OF ARGUMENT

I. By constructing farm produce sales locations, the State of Georgia has not "entered the market place," thus become a market participant; rather, it continues to act in the governmental role of a "market regulator." While it is true that, under the authority of the cases cited by Petitioners, a state or other governmental entity acting as a "market participant" may not under certain circumstances be subject to scrutiny under the Commerce Clause, that rule of law is simply inapplicable in the case at bar. There is no economic market for the sale of farmer's market space. Rather, in its governmental capacity, the State of Georgia has simply elected to provide a governmental service, comparable to the provision of any other government service such as fire protection, police protection, or road construction. By enacting rules for its farmer's market which distinguished between the citizens of Georgia and non-residents of Georgia in the assignment of space, the State has run afoul of the Commerce Clause of the United States Constitution.

II. It has been clearly established as a principle of constitutional law that state action or legislation, the goal of which is "economic protectionism," is impermissable under the Commerce Clause. That being the sole and avowed purpose of the rule here under attack, the rule is a *per se* violation of the Commerce Clause.

ARGUMENT AND CITATION OF AUTHORITY

I. The actions of the State of Georgia and the Department of Agriculture are subject to scrutiny and control under the Commerce Clause of the United States Constitution. The decision of the Fifth Circuit is neither controlled by nor in conflict with the Supreme Court decision in *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976) and *Reeves, Inc. v. Stake*, __U.S.__, 100 S. Ct. 271 (1980).

The Petitioners have stated, without supporting evidence of findings of fact by the District Court, the bold and erroneous conclusion that the State of Georgia has "entered the economic market of the construction of farm produce sales locations". It is upon this unsupported conclusion that the Petitioners predicate their argument that the regulation of the State of Georgia granting preference to Georgia farmers over Alabama farmers is not the kind of activity with which the Commerce Clause is or ought to be concerned.

If the State of Georgia has "entered the market place" by building a farm produce sales location, it has entered that market place alone. There is no evidence in the record, and there can be no evidence, that there are other persons or entities in the business of providing space for the sale of farm produce by farmers. The Columbus Farmers' Market is the only place in West Central Georgia or East Alabama at which a farmer who plants and

produces his own crops can bring those crops and offer them to the public for sale. In an attempt to avoid the requirements of the Commerce Clause, and in an attempt to squeeze itself within the narrow perameters of the *Hughes* decision, *supra*, Petitioners would lead the Court to believe that the States of Georgia and Alabama are flooded with produce markets, each of which is competing furiously for farmers to occupy its space. These fictitious markets no doubt advertise, engage in price wars, lure farmers back and forth between markets through the use of discount prices, increased services, etc. An argument based upon the existence of such fictitious markets is not merely without merit; it is absurd.

The argument made by Petitioners, carried to its logical conclusion, would require us to conclude that the State of Georgia has also entered the economic market for highways, in competition with other equally fictitious private highway owners. Thus, when automobiles from the State of Alabama wish to ride on State owned roads, the State of Georgia can offer a preference in crowded times to Georgia residents, and if the Alabama residents do not like the preference, they can simply take their vehicular business to the private road owners who compete so vigorously with the State of Georgia for vehicular traffic.

It is an abstractly correct principle of law that, when a governmental entity such as the State of Georgia does enter the marketplace as a competitor, then it has the same rights as any other competitor as to choosing those with whom it will deal. Nevertheless, as stated above, there is no such "entry into the marketplace" by the State of Georgia as a competitor, and the rationale of the cases cited by Petitioners is therefore not applicable in this case. It is of interest to note that the "entering the marketplace" argument, now relied

upon so heavily by the Petitioners, was not raised or dealt with at the trial court level. The first mention in the record of that argument was made by the Court of Appeals for the Fifth Circuit, dissenting opinion of Judge Randall. Petitioners quickly latched onto this rationale as a last resort, but failed completely to raise the issue in the trial court.

Petitioners seek refuge in the holdings of *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976), and *Reeves, Inc. v. Stake*, ___U.S.___, 100 S. Ct. 2271, 65 L. Ed. 2d___ (1980). Respondent respectfully submits that neither of these cases is authority for overturning the decision of the Court of Appeals in the case *sub judice*. Those cases suggest that the applicability of the Commerce Clause to "state action" may be different in cases where the State has become a market participant, as distinguished from those cases where the State acts in its traditional role as "market regulator." While this is an abstractly correct principle of law as announced by this Court, that principle has no relationship or bearing on the case now before this Court.

In *Alexandria Scrap, supra*, the State of Maryland had enacted legislation whereby it would purchase every Maryland-titled junk car hulk which had been converted into scrap. The legislation distinguished between in-state sellers of scrap hulks, and those who resided outside the State of Maryland. A more difficult bookkeeping process was prescribed for the out of state sellers of junk automobiles.

In upholding the Maryland law, this Court stated that, when a State itself enters the marketplace, becomes a participant and a competitor in the sale or purchase of goods or commodities, then the State has the same rights and duties as any other market participant. Thus, the State can purchase from whomever it pleases, and may sell to whomever it pleases; and, if the State chooses not to deal with

persons or entities from outside its own borders, it may do so free of restraint from the Commerce Clause.

In *Alexandria Scrap, supra,* there can be no question that the State of Maryland had entered the marketplace for the purchase of hulk automobiles. The automobiles were not previously owned by the State of Maryland, they were not under the control of that governing body, and people who did own or control these junk hulks could bring them to the State, show the proper documentation, and receive money for them. This was clearly the purchase by the State of Maryland of junk automobiles. How does the factual situation of the case at bar compare with the *Alexandria Scrap* factual situation? Respondent respectfully submits that there is no similarity between the tow cases, and respectfully suggests that the cases simply have nothing to do with one another. In the case at bar, the State of Georgia ownes real estate on which it has established a farmers' market. The State is not buying or selling anything; in its governmental capacity, it is simply making available a marketplace for those who wish to buy and sell produce. Thus, the position of the State of Georgia that it has "entered the marketplace" by selling market space is untenable and unsupported by either fact or law. This conclusion is not altered by the fact that the State exacts a license fee from farmers selling produce at the Columbus Farmers' Market. In numerous Commerce Clause cases, a license fee was required of both residents and nonresidents; yet the requirements of the Comerce Clause have nevertheless been held to be applicable.

The other case upon which Petitioners rely, *Reeves, Inc. v. Stake,* ___U.S.___, 100 S. Ct. 2271, 65 L. Ed. 2d___(1980), is likewise inapplicable to the facts of this case. There, the State of South Dakota was selling cement produced at a State-owned plant. In times of shortage, the State chose to sell its cement

only to residents of the State of South Dakota. It is again clear in *Reeves, Inc., supra*, that South Dakota had entered the marketplace as a participant and as a competitor, and under long established principles could buy or sell to or from whomever it chose.

Respondent submits that the better authority upon which this case should be decided is a case not cited by the Petitioners, but is a case which much more closely resembles the case at bar with regard to both the law and facts involved. In *City of Philadelphia v. State of New Jersey*, 437 U.S. 617 (1978), this Court declared to be unconstitutional a New Jersey statute which prohibited out of state garbage from being deposited in New Jersey landfills under the pretense of preserving its diminishing landfills for New Jersey garbage. Because the regulation was aimed only at out of state garbage, the Supreme Court found it to violate the principle of non-discrimination inherent in the Commerce Clause, and discussed so frequently in Commerce Clause cases.

In holding the New Jersey statute unconstitutional, this Court applied the same approach which we have urged throughout the course of this case, to-wit: a virtual *per se* rule of invalidity where the sole purpose of the state statute, rule, or action is "economic protectionism" for its citizens. With the Court's indulgence, we shall quote from the *City of Philadelphia* case, *supra*, at some length.

> "The opinions of the Court through the years have reflected an alertness to the evils of economic isolation and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is

effected by State Legislation, a virtually *per se* rule of invalidity has been erected. See, e.g., *H. P. Hood & Sons, Inc. v. Du Mond, supra, Toomer v. Witsell,* 334 U.S. 385, 403-406, 92 L. Ed. 1460, 68 S. Ct. 1156; *Baldwin v. G. A. F. Seelig, Inc., supra; Buck v. Kukendall,* 267 U.S. 307, 315-316, 69 L. Ed. 623, 45 S. Ct. 324, 38 ALR 286. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's border. *Cf. Welton v. Missouri,* 91. U.S. 275, 23 L. Ed. 347. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844.

> 'Where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interestate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits .... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. See also *Raymond Motor Transportation, Inc. v. Rice, supra,* at 441-442, 54 L. Ed. 2d 664, 98 S. Ct. 787; *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 352-254, 53 L. Ed. 2d 383, 97 S. Ct. 2434; *Great A & P Tea Co.*

> *v. Cottrell*, 424 U.S. 366, 371-372, 47 L. Ed. 2d 96 S. Ct. 923.'
>
> "The crucial inquiry, therefore, must be directed to determining whether ch 363 is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 57 L. Ed. 2d 475, 98 S. Ct. 2531.

Upon examination of its purposes, this Court struck down the New Jersey regulation in language which squarely fits the case at bar.

> "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. It is true that in our previous cases the scarce natural resource was itself the article of commerce, whereas here the scarce resource and the article of commerce are distinct. But the difference is without consequence. In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionism reasons." *City of Philadelphia v. State of New Jersey*, 57 L. Ed. 2d 475 at 484.

Respondent respectfully submits that there can be no serious question that the rule in issue in the case at bar is a protectionist measure imposed by the State of Georgia to grant a preference to its citizens in the conduct of commerce, over the citizens of other states. That being the case, it is a *per se* violation of the Commerce Clause, and should be struck down. The argument of the State, to the effect that it has

simply entered the marketplace, is wholly without merit or support.

II. Does the rule of the State of Georgia and of the Department violate the Commerce Clause of the United States Constitution?

The Respondent accepts as accurate the three pronged analysis suggested by the Petitioners, the source of which anaylsis is *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See also, *City of Philadelphia v. State of New Jersey*, *supra*, and *Pike v. Bruce Church, Inc.*, *supra*. According to the Hughes analysis, the challenged statute or regulation must first regulate evenhandedly with only incidental effects on interstate commerce; it must also serve a legitimate local purpose; and, if these two prerequisites are met, it must then be determined whether a less discriminatory alternative might be available to promote the same local purpose.

Petitioners have, without support in law or fact, boldly concluded that the first two prerequisites of the *Hughes* analysis are met. This is, Petitioners have suggested that the rule does "regulate evenhandedly", and that it serves a legitimate local purpose. Respondent respectfully submits that neither the first nor the second nor the third prong of the *Hughes* test can be met by the rule in question.

Does the challenged rule "regulate evenhandedly"? On its face, it does not. Alabama farmers are required to use one area of the farmers' market, while Georgia farmers are allowed to use another area. Such a regulation which discriminates solely on the basis of State residency cannot be said to be evenhanded.

For an example of "evenhandedness", see *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, 82 L. Ed., 734 (1937). There, the State of South Carolina had enacted legislation which prohibited the use on state highways of motor trucks and semi-trailer trucks

exceeding 90 inches in width and 20,000 pounds in weight. This Court upheld the validity of the statute, and emphasized the non-discriminatory nature of the law. It applied to residents of South Carolina and to nonresidents alike. The State of South Carolina did not, in that case, attempt to allow its own residents, in order to promote local industry, to carry larger or heavier loads upon the state highways, simply because they had paid for the construction of those highways. On the contrary, all truckers, residents and nonresidents alike, were required to obey the same regulation. In the case at bar, the contrary is true. One rule applies to residents, and another to nonresidents.

Thus, the rule involved here fails to meet the first test of the *Hughes* case, *supra;* the rule does not regulate "evenhandedly". On its face, it is discriminatory.

Does the regulation in suit foster a legitimate state or local interest? It is beyond peradventure that it does not. If there is any theme which consistently runs through the so-called milk cases, i.e., *Hood v. DuMond*, 336 U.S. 525 (1949); *Baldwin v. Seelig*, 294 U.S. 511 (1934); *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1950); and *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964), that theme is this: a regulation or statute that has as its purpose the granting of an advantage to the residents of Georgia over the residents of another state in the sale of produce or the conduct of commerce is, *per se*, invalid. It is precisely the purpose of the regulation in suit i.e., granting an economic advantage to local producers, which has been consistently declared to be invalid by this Court.

The regulatory scheme in the case at bar is a remarkable one in this regard; in every other case which our research has revealed, the State has at least attempted to camoulflouge its attempt to protect and foster its own local commerce at the

expense of commerce from other states as a health, safety or moral measure. Even in those cases, however, the courts have not observed lables or form, but have looked with very strict scrutiny at the substance of the regulations. Yet when the State gives as its only and avowed purpose the discrimination against interstate goods, and the protection of intrastate commerce, that regulation is *per se* unconstitutional.

In *Dean Milk Company v. City of Madison, Wisconsin*, 340 U.S. 349 (1950), this Court stated:

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, *save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.* (citation omitted) Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interest and the available method of protecting them. (citation omitted)" (emphasis added)

In the case at bar, the State of Georgia "artlessly discloses an avowed purpose to discriminate against interstate goods." By so doing, the State relieves this Court of the necessity of balancing the local interest sought to be protected against the interest of interstate commerce. Since the avowed purpose of the regulation is to discriminate, the court's inquiry need go no further. It is *per se* unconstitutional.

Thus, the regulation here sought to be upheld by the State of Georgia neither regulates evenhandedly, nor does it foster a legitimate local purpose. Yet assuming *arguendo* that prongs numbered 1 and 2 of the *Hughes* rationale were met, can it be said that no less discriminatory alternative is available to foster the local pupose?

The "local purpose" suggested by the Petitioners before this Honorable Court is the purpose of allocating a finite resource (sales space) in a fair and reasonable manner. It is interesting to note that in the Petitioners' brief in the Fifth Circuit Court of Appeals, the State gave as its pupose the promotion of in-state industry. "Therefore, the burden placed upon interstate commerce *to promote an in-state industry . . . foste s a legitimate state interest . . .*" Defendants' brief at p. 19 (emphasis added).

In any event, if the purpose of the regulation is to allocate in a fair and rational and reasonable manner a finite resource, certainly there are other less discriminatory alternatives available. For example, the space could be allocated by means of a lottery, with no distinction made on the basis of state residency. Or, space could be allocated on a time basis, again with no discrimination or distinction made based upon state residency. Thus, if space was unavailable, and any farmer (Georgia or Alabama) had been in the preferable sales location for a period of eight days (for example), he could be required to move to the less desirable location for a period of eight days, and then be allowed to return to the elevated shed area.

Respondent does not pretend to suggest all of the non-discriminatory alternatives available to the State of Georgia if its real intent is to allocate a finite resource. On the other hand, Respondent respectfully submits that the State has chosen not the least discriminatory alternative, but the most discriminatory alternative. What method of allocating space could be more discriminatory against interstate commerce than a scheme which has as its sole determining factor the state of residence of the farmer, and which *always* grants the preferable sales location to Georgia farmers?

Respondent respectfully submits that the

challenged regulation is neither evenhanded nor legitimate, nor the least discriminatory alternative. For these reasons, Respondent submits that the decision of the Fifth Circuit Court of Appeals should be upheld and that the Petition for Writ of Certiorari should be denied.

CONCLUSION

The issues raised in the Department's Petition for Writ of Certiorari have long been settled in favor of the Respondent. It is beyond reasonable question that a state may not enact any rule or regulation, or adopt any custom or procedure, which has as its purpose and effect the protection of an in-state industry at the expense of nonresident competitors. To adopt the position asserted by Petitioners would be to erase more than fifty years of Commerce Clause precedent from the pages of this Court's decisions. Respondent respectfully submits that the issue raised is a matter of well established Constitutional law, and that the decision of the Fifth Circuit Court of Appeals is imminently correct. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have served Petitioner with three copies of the foregoing brief in opposition to the Petition for Writ of Certiorari by mailing a copy of same, postage prepaid and properly addressed, to Carl C. Jones, 132 State Judicial Building, Atlanta, Georgia 30334.

This 15th day of May, 1981.

Jerry A. Buchanan